IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR., FRANK L. MADLA, ELIOT SHAPLEIGH, LETICIA VAN DE PUTTE, ROYCE WEST, JOHN WHITMIRE, and JUDITH ZAFFIRINI,	§	
Plaintiffs,	§	
vs.	§	Civil Action No. L:03CV113
STATE OF TEXAS, RICK PERRY, In his official capacity as Governor of the State of Texas, and DAVID DEWHURST, In his official capacity as Lieutenant Governor and Presiding Officer of the Texas Senate,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION TO REFER CASE IMMEDIATELY TO THE CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT TO CONVENE A THREE-JUDGE COURT, AND REQUEST FOR ORAL HEARING

TO THE HONORABLE JUDGE OF THIS COURT:

1. Plaintiffs filed their Complaint on August 11, 2003, pursuant to Sections 2, 5, and 12(d) of the Voting Rights Act of 1965, as amended, and 42 U.S.C. §1983. Pursuant to Fed. R. Civ. Proc. 12(b)(1), 12(b)(3), and 12(b)(6), the State of Texas, Rick Perry, in his official capacity as Governor of the State of Texas, and David Dewhurst, in his official capacity as Lieutenant Governor and Presiding Officer of the Texas Senate ("Defendants") move to dismiss Plaintiffs' Complaint in its entirety. The same Plaintiffs have filed related

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litigation in Travis County District Court.

2. Plaintiffs' claims under Section 5 of the Voting Rights Act should be dismissed as wholly insubstantial under §5 of the Voting Rights Act of 1965. As for Plaintiffs' remaining claims under §§2 and 12(d) of the Voting Rights Act, as well as 42 U.S.C. §1983, the Defendants move to dismiss Plaintiffs' claims in their entirety pursuant to Fed. R. Civ. Proc. 12(b)(1), 12(b)(3), and 12(b)(6). In the alternative, should this Court choose not to dismiss Plaintiffs' §5 claims, Defendants concur with Plaintiffs' request for an order immediately referring Plaintiffs' §5 claims to the Chief Judge of the United States Court of Appeals for the Fifth Circuit to convene a three-judge court.

I.
Standard of Review

3. Pursuant to 28 U.S.C. § 2284(a) and 42 U.S.C. § 1973c, upon the filing of a request for three judges, the district court has the obligation to decide, as a preliminary matter, whether to immediately request the convening of a three-judge panel in a cause of action involving §5 of the Voting Rights Act of 1965. The legal standard for determining whether a district court must immediately request a three-judge panel is whether the complaint states a "substantial" claim. *See Gonzalez v. Monterey County, Cal.*, 808 F. Supp. 727, 731 (N.D. Cal. 1992) (citing *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715, 82 S.Ct. 1294, 1296 (1962)). A claim is insubstantial if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of the controversy." *See Conolly v. Pension Benefit Guaranty Corp.*, 673 F.2d 1110, 1114 (9th Cir. 1982).

II.

Background

4. Texas Governor Rick Perry convened a Second Called Session of the Texas Legislature commencing on July 28, 2003, for the purpose of considering legislation relating to: (1) congressional redistricting; (2) certain transportation-related issues; (3) state finance issues, including adjustments to school district fiscal matters; (4) certain election-related issues; and (5) reorganization and reform measures applicable to state government. This Second Called Session ends by law on August 26, 2003.

5. Instead of conducting the business of the State of Texas as they were elected to do, 11 Democratic Senators fled to New Mexico, denying the Senate a quorum and shutting down the Texas Senate.

6. During this Second Called Session, Lieutenant Governor David Dewhurst—the President and presiding officer of the Texas Senate—has declared that he will not attempt to place a "blocker bill" ahead of other legislation. Under ordinary Texas Senate rules, Senators consider bills on the Senate floor in the order that they emerge from committee. *See* TEX. S. RULE 5.12 (Texas Senate Rules, at Attachment A). That is the Senate's regular order of business. To debate a bill "out of its regular calendar order," the rules require that two-thirds of the Senators present must agree to suspend Rule 5.12 in order to consider the bill. *See* TEX. S. RULE 5.13. In the past, an inconsequential bill has often—though not always—been filed by a Senator early in the legislative session. The Lieutenant Governor may then quickly refer it to a committee, so that it can be voted out by that committee and placed atop the Senate's intent calendar, which determines its order of business on the floor. Because the Senate Rules determine the order of business and provide that bills will be placed on the order of business in the order in which they are voted out of committee, having

such a bill at the top of the intent calendar forces lawmakers either (1) to vote out or otherwise dispose of the purported "blocker bill" or (2) to obtain support from two-thirds of the Chamber to suspend the regular order of business and take up another bill first. This bill is often referred to as a "blocker bill" because it blocks any other legislation from being debated unless two-thirds of the Senators present support doing so.

7. This tradition has not always been followed in the Texas Senate and, in fact, there have been numerous occasions when various Lieutenant Governors have declined to use a "blocker bill" during a Called Session. Notably, the use of a "blocker bill" is not grounded in, much less mandated by, any constitutional or statutory provisions or rules enacted by the Texas Senate, nor is it used by the Texas House. It is purely a legislative calendar-management tool utilized through the discretion of the Lieutenant Governor, committee members, and other Senators to control the flow of legislation to the Senate floor and to manage the day-to-day affairs of the Senate. No one person alone may control the use of a blocker bill: its use depends on (1) a Senator's introducing a bill intended to be used as a blocker; (2) the Lieutenant Governor's quick referral of the bill to committee; (3) the committee's quick reporting of the bill; and (4) the Lieutenant Governor's and Senate's ongoing decision not to take up the "blocker bill" for a vote.

8. In the case at bar, Plaintiffs filed a §5 enforcement claim on the erroneous assumption that Lieutenant Governor Dewhurst's decision not to pursue the use of a "blocker bill"[1] this Second Called Session is a violation of §5 of the Voting Rights Act of 1965. 42

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[1] As discussed above, the "blocker bill" is an informal tradition of the Senate which would require two-thirds of the Senators to vote in favor of taking up for consideration a bill if it is filed after the "blocker bill." **It appears that Plaintiffs intend to refer to the "blocker bill" when they mention "2/3 Rule." *See, e.g.*, Plaintiffs' Complaint at ¶ 26. Plaintiffs have not and cannot point to any such Senate "2/3 Rule."**

U.S.C. § 1973c. This federal statute requires a covered jurisdiction to obtain either judicial or administrative preclearance before enforcing any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" that is "different from that in force or effect on November 1, 1972." *See id.* The decision by the Lieutenant Governor not to pursue the use of a "blocker bill" is not a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. "Blocker bills" have been used inconsistently by the Texas Senate. Legislation has been passed many times without the use of either a "blocker bill" or a two-thirds supermajority vote both before and after November 1, 1972. *See* Affidavit of Patsy Spaw, Secretary of the Senate (Attachment B).

9. In short, there is no "two-thirds rule," the Senate's practice has not changed, and, in any event, the procedures at issue are not "with respect to voting." The Defendants therefore request that this Court immediately dismiss this case as wholly insubstantial and without merit or, in the alternative, enter an order immediately referring this case to the Chief Judge of the United States Court of Appeals for the Fifth Circuit for the convening of a three-judge court.

II.
Argument

A. Plaintiff's Lawsuit Should Be Dismissed For Failure to State a Claim.

10. Plaintiffs' lawsuit is vague and ambiguous as to precisely which new Senate Rule they are contending must be precleared by the Department of Justice. As such, Plaintiffs have failed to state a claim upon which relief may be granted. The Defendants hereby move for dismissal on that ground pursuant to Federal Rule of Civil Procedure

12(b)(6).

i. There Is No "2/3 Rule"

11. Under §5 of the Voting Rights Act, preclearance is available only for a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972." In order to determine whether there has been such a change, it is appropriate to compare the current practice with the practice in place at the time the State became covered by the Voting Rights Act. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495, 112 S.Ct. 820, 825 (1992) ("To determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted. Absent relevant intervening changes, the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison.") In Texas, the relevant date for comparison is November 1, 1972—the date that Texas became a covered jurisdiction under the Voting Rights Act. 42 U.S.C. §1973b(b).

12. Under the standard set out in *Presley*, therefore, Plaintiffs must allege facts supporting each of the two prongs: first, they must state what practice was in existence on November 1, 1972; second, they must state what current changed practice they are challenging. Plaintiffs have done neither.

13. Plaintiffs do not clearly state what practice it is that they are challenging. At various points in their Complaint, they refer to "the practice in the Texas Senate for a Member to file a bill, known as 'a blocker bill', as the first piece of legislation in the session," Complaint at ¶ 19, n.1; an "extraordinary practice or procedure known as the 2/3 Rule, a long-standing practice of the Texas Senate that empowers the chamber's minority by

requiring a 2/3 vote to open debate," Complaint at ¶ 25; and "traditional practices or procedures of having a supermajority 2/3 Rule for congressional redistricting," Complaint at ¶ 29.

14. Plaintiffs repeatedly refer to "the 2/3 Rule" (capitalized, no less). But there is no "2/3 Rule." It does not appear in the Senate Rules. Plaintiffs cannot give this Court the text of the "2/3 Rule" because there is no such rule.

ii. Senate Practice Has Not Changed

15. Further, Plaintiffs do not state what practice or procedure was in force or effect on November 1, 1972, the relevant date for determining whether there has been a change in procedure. It is an essential element of their claim that the challenged practice be "different from that in force or effect on November 1, 1972." 42 U.S.C. § 1973c. Without a statement as to the practice in force or effect on November 1, 1972, Plaintiffs fail as a matter of law to state a claim upon which relief may be granted.

16. The Senate used "blocker bills" on occasion before 1972, but has never *required* that a "blocker bill" be used. *See* Affidavit of Patsy Spaw, Secretary of the Senate (Attachment B). For example, prior to 1972, "blocker bills" were not used in the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature. *Id.* In those Sessions, the Senate did not recognize a "blocker bill" and therefore did not suspend the regular order of business by a two-thirds vote. Bills were considered consecutively in the order in which they were voted out of committee. *Id.* Even when a "blocker bill" may have been used, a failure to get a two-thirds majority to suspend the regular order has not precluded the Senate from disposing of "blocker bills" so that the desired bill could be taken up on a simple majority vote. As noted

in the affidavit, in 1968, under Lieutenant Governor Preston Smith, "an attempt was made to suspend the regular order of business to bring up H.B. 2, a tax bill, on second reading." When the motion to suspend failed 14 to 16, the bill was still brought up on a subsequent day "without a two-thirds suspension vote." *Id.* Similarly, bills that might otherwise have served as "blocker bills" were disposed of in 1961 to allow passage of legislation relating to the Texas Liquor Control Act to be taken up without a two-thirds vote.

17. The same intermittent use of "blocker bills" existed after 1972. *Id.* No blocker bills were used in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, or the First Called Session of the 63rd Legislature, and no two-thirds vote to suspend the order of business was taken. *Id.* Consequently, the use of "blocker bills" was allowed, but not required, under Senate Rules prior to 1972 and is allowed, but not required, under the Senate Rules at this time.

iii. The Procedures Are Not "With Respect to Voting"

18. A claim is insubstantial under the Voting Rights Act if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of the controversy." *See Gonzalez*, 808 F. Supp. at 731. Plaintiffs' suit presents an "insubstantial" claim. The root of Plaintiffs' complaint appears to be that the Senate may this time consider legislation without the use of a "blocker bill" and, thus, without a two-thirds vote to take up the legislation. Such a decision would not, as a matter of law, require preclearance under §5 of the Voting Rights Act of 1965. 42 U.S.C. §1973c.

19. The statute requires a covered jurisdiction to obtain either judicial or administrative preclearance before enforcing any new "voting qualification or prerequisite

to voting, or standard, practice, or procedure with respect to voting." *See id.* The decision not to utilize a "blocker bill" is not a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. Plaintiffs' §5 claim is therefore so insubstantial that it must be dismissed.

20. The State of Texas does not dispute that if the Legislature were actually to adopt a redistricting plan during the Called Session, the plan itself would be subject to preclearance. In the event that any plan is passed, the State of Texas will submit it for preclearance. However, the Voting Rights Act contemplates preclearance only once, when action is taken; it does not contemplate multiple submissions for preclearance on the same issues, before and after action is actually taken. If preclearance were required for the mere contemplation of legislative plans, as opposed to the adoption of these plans, then the daily inter-workings of state legislatures would be made subject to ongoing federal scrutiny.

21. The Supreme Court of the United States has stated that §5 "is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting. It does not." *See Presley*, 502 U.S. at 509, 112 S.Ct. at 832. In *Presley*, the Court held that changes that concern only the routine, internal operations of an elected body and the distribution of power among officials are not subject to §5 because such changes have no direct relation to, or impact on, voting. *See id.* at 506. In light of this on-point ruling, it is beyond serious dispute that the decision not to utilize a "blocker bill" is not a covered change that falls under §5, and therefore does not require preclearance.

22. The obvious impact of the Lieutenant Governor's discretionary decision not to attempt to place a "blocker bill" ahead of other legislation in the Texas Senate is that a bill may be passed, pursuant to the Senate rules, by a simple majority of 16 Senators instead of

a two-thirds supermajority of 21 Senators.

23. Plaintiffs' arguments are fundamentally flawed because, *inter alia*, they ignore the requirement that changes be "with respect to voting." As *Presley* explained, §5 is triggered by changes in standards, practices or procedures that actually pass, *i.e.*, that are formally adopted by a Legislature or other governmental body. That is because the Voting Rights Act protects *voters*, and the ability of voters to actually vote. And only those changes that pass are able to affect the ability of voters (as opposed to legislators) to vote. Until something passes, §5 is not triggered because the rights of voters are not affected.[2] There are a myriad of legislative decisions—which Senators are named committee chairs, to which committees bills are referred, which Senators are recognized on the floor, which parliamentary procedures are employed to advance or hinder a bill's passage—that are carried out daily in every legislature, but they do not trigger §5 because, under *Presley*, they affect merely the internal governance of the elected body, not the rights of individual voters.[3]

24. Other federal court decisions make it clear that an internal distribution of power among an elected body's officials is not covered by §5. *See Holley v. City of Roanoke*, 149

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[2] Accordingly, Plaintiffs' claim concerning "the State of Texas's decision to undertake congressional redistricting in 2003," Complaint at 14, is likewise not cognizable under §5; the Voting Rights Act covers only changes "with respect to voting" that are actually enacted, and does not address legislative decisions about which legislation to consider and when.

[3] For the same reason, Plaintiffs' reliance on *Morse v. Republican Party of Virginia*, 517 U.S. 186, 207-09 (1996), *see* Complaint at ¶32, is unavailing. In *Morse*, the Court was considering the ability of *voters* to participate in the "political process" by participating in a political party primary; the Court did not address the situation here: the complaint of elected representatives (not voters), because they believe the parliamentary process has left them with diminished influence in the legislature. The Voting Rights Act simply does not address such frustrations.

F. Supp.2d 1310, 1313 (M.D. Ala. 2001) (change in city council's decision-making process for appointing school board members did not require preclearance); *Bonilla v. City Council of the City of Chicago*, 809 F. Supp. 590, 597 (E.D. Ill. 1992) (city's requirement that at least ten alderman support a proposed redistricting ordinance before it can be submitted for voter approval not a standard, practice or procedure under §2 of the Voting Rights Act). Indeed, in reaching its decision, the *Bonilla* court stated the following:

> Since legislatures operate under majority rule principles, requiring a majority of legislators to approve a particular redistricting plan is clearly permissible under the Voting Rights Act. Indeed, the *Bonilla* Plaintiffs do not even suggest that they could challenge a statutory procedure which allowed a majority of the City Council to approve a redistricting ordinance.

See id. at 596.

25. Similarly, in *DeJulio v. Georgia*, 127 F. Supp. 2d 1274 (N.D. Ga. 2001), *aff'd in part, rev'd on other grounds*, 276 F.3d 1244 (2001), the court held that §5 did not apply to changes in internal rules and procedures by which the Georgia State Legislature enacted local legislation. *See id.* at 1300-02. In so doing, the court opined that:

> Based on the precedent of *Presley*, this Court must conclude that preclearance was not required in this case. It is true that changes in the various legislative delegations' rules might affect the distribution of power among officials and certain officials might have more or less authority after the changes. It is also true that the value of a citizen's vote may be diminished when his elected representative has less authority. Nevertheless, the Supreme Court has clearly, unmistakably and explicitly held that such changes in internal rules and procedures do not raise a Voting Rights Act preclearance issue.

See id. at 1301-02 (emphasis added).

26. Moreover, the court recognized that principles of federalism dictate this logical result:

> Furthermore, the Voting Rights Act has never been interpreted as giving the Department of Justice broad supervisory authority over the internal operation of state legislatures. "If federalism is to operate as a practical system of

governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments."

See id. at 1302 (quoting *Presley*, 502 U.S. at 510).

B. Plaintiff's Lawsuit Seeks Improper Federal Intrusion

27. The unrestrained construction of §5 urged in this lawsuit would radically overhaul the operating procedures of an elected governmental body, in essence mandating that the President of the Texas Senate (the Lieutenant Governor of Texas) cede to federal authorities near-complete control over the daily, internal workings of the Senate, no matter what the governing Senate rules say. Such an overbroad reading would allow federal law to seriously encroach on the internal governing procedures of a sovereign State and dictate how the Senate calendar and daily flow of legislation through the Chamber is conducted. It is hard to imagine processes more fundamental to the sovereignty of States than the ongoing legislative decisions of which bills to introduce, and when, and which bills to pass, and when.

28. Indeed, Plaintiffs would have a hard time clearly stating what relief they seek, because to state the relief sought by Plaintiffs is to realize its overbreadth. If the Court were to rule in their favor, the Court would presumably issue an injunction that the Texas Senate may not consider redistricting legislation unless: (1) a Senator first introduces separate legislation, a "blocker bill," (2) the Lieutenant Governor immediately refers it to committee, (3) the committee passes the bill before any other legislation is passed, and (4) the Senate refrains from passing the "blocker bill" once it comes to the floor. The process would be nothing short of a federal court's writing and imposing procedural rules for a state legislature governing the introduction and passage of legislation and requiring a 2/3 vote before

redistricting legislation can ever be voted on. A federal injunctive order that intruded into the sovereignty of a State to that level, and that in effect commandeered the machinery of state government in such a manner, would raise very serious constitutional problems that could threaten the Voting Rights Act itself. *See Printz v. United States*, 521 U.S. 898, 912, 117 S.Ct. 2365, 2373 (1997) ("We have held . . . that state legislatures are *not* subject to federal direction." (emphasis in the original)); *New York v. United States*, 505 U.S. 144, 179, 112 S.ct. 2408, 2429 (1992) ("No . . . constitutional provision authorizes Congress to command state legislatures to legislate."); *see also Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480, 117 S.Ct 1491, 1498 (1997) (noting the "serious federalism costs already implicated by §5").

29. The informal agreement to place a "blocker bill" atop the Senate calendar is simply that: an informal agreement—sometimes used, sometimes not. But any determination that this internal operational arrangement somehow implicates §5 would depart drastically from governing precedent and slide down a slippery slope that would empower federal officials with almost limitless authority to micromanage a range of what are quintessentially state legislative judgments.

30. The United States Supreme Court has considered similar arguments before—though none quite so remarkable as those suggested in this lawsuit—and roundly rejected them. Whether the presiding officer of the Texas Senate chooses to use a "blocker bill" as an internal parliamentary tool to manage the Senate calendar is plainly not a change "with respect to voting" covered by §5. A wealth of on-point precedent demonstrates that this parliamentary decision—which concerns "the internal operations of an elected body," *Presley*, 502 U.S. at 503, not Texas election law writ large (or small)—in no way triggers

scrutiny under the Act. Covered changes must bear a direct relation to voting itself, and §5's coverage simply does not reach a state senate's "internal operating procedures." *Id.* at 504. Section 5 is unambiguous, and the Supreme Court has rejected claims that urge an unconstrained interpretation. The governing law is clear: changes "with respect to voting" are covered and require preclearance; changes "with respect to governance" are not. *Id.* Finding otherwise would represent the thin edge of a very powerful wedge that could be used to leverage federal control over the most core, internal state legislative matters.

31. Since the requirements of §5 do not apply in this case, Defendants request that this Court dismiss the claim, as it is wholly insubstantial and completely without merit.

C. Plaintiffs' Remaining Claims Under Sections 2 and 12(d) of the Voting Rights Act, 42 U.S.C. §1983, and the First, Fourteenth, and Fifteenth Amendments Should Be Dismissed.

32. Plaintiffs' Complaint should be dismissed pursuant to Federal Rule 12(b)(6) because it fails to state a claim upon which relief may be granted. The Complaint does not specify what action or conduct is complained of. All of Plaintiffs' claims stem from the alleged elimination of a so-called "2/3 Rule," but the Complaint fails to state the text of any such rule (which does not exist), where it may be found, or how Defendants have control over its application.

33. Plaintiffs' Complaint must also be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) because this dispute is not justiciable on the grounds that it is not ripe.

34. Federal Courts should avoid premature adjudication of disputes which either may not occur as anticipated or may not occur at all. *See Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 1259 (1998). Moreover, ripeness exists not only as an Article III

limitation on federal judicial matters, but also as a prudential concern to avoid plunging the judiciary into the business of creating advisory opinions based on hypothetical facts. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18, 113 S.Ct. 2485, 2496 n. 18 (1993). Since no congressional redistricting plan has passed both Houses and been signed into law by the Governor, it would be pure speculation to believe that any future congressional redistricting bill would violate any federal or state law. At this point, it is impossible to say with certainty (1) if the Texas Legislature will pass any congressional redistricting plan, or (2) if it were to do so, what that plan would entail. Accordingly, Article III constitutional limitations, and prudential limitations as well, compel this Court to dismiss the remainder of Plaintiffs' Complaint as not yet ripe.

35. Plaintiffs' claims under §2 of the Voting Rights Act and other claims relating to redistricting are not ripe because no redistricting plan has yet been passed by the Legislature. Plaintiffs allege that the "decision to abandon the 2/3 Rule *will* result in discrimination" in violation of Section 2. Complaint at ¶ 38 (emphasis added). In order to determine whether there has been a violation of §2 of the Voting Rights Act, however, the Court "must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'" *Thornburg v. Gingles*, 478 U.S. 30, 44, 106 S.Ct. 2752, 2763 (1986) (quoting S.Rep. No. 97-417, 97th Cong., 2d Sess. at 27, reprinted in 1982 U.S.C.C.A.N. 177, 205). This is a "results" test rather than an "intent test." *Id.* Until the Senate actually adopts a redistricting plan, the Court can only guess what impact such a plan might have on minority electoral opportunities—it cannot assess what the results of such a plan might be. When the alleged harm is still speculative, a claim is not ripe

for review. *See NLRB v. Dredge Operators Inc.*, 19 F.3d 206, 213 (5th Cir. 1994) (holding that a "speculative" scenario was not ripe for review).

36. Plaintiffs' claims under the First, Fourteenth, and Fifteenth Amendments should also be dismissed for lack of standing. Plaintiffs assert that returning to Texas would be a "violation of the representational interests of their constituents," Complaint at ¶ 42, and would "harm minority voters and the ability of their elected representatives to protect their voting rights in the congressional redistricting process," Complaint at ¶ 38. Plaintiffs lack standing to assert claims deriving from the rights of their constituents; such claims are properly brought by the voters themselves. *See Bonilla v. City Council of the City of Chicago*, 809 F. Supp. 590, 593 (E.D. Ill. 1992). Moreover, "the alleged injury must be legally and judicially cognizable," *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 2317 (1997), and Plaintiffs' claims are not because their standing is "based on a loss of political power, not loss of any private right," *id.* at 821. Because they have alleged "no injury to themselves as individuals . . . [and] the institutional injury they allege is wholly abstract and widely dispersed," *id.* at 829, Plaintiffs' remaining claims must be dismissed.

D. In the Alternative, Plaintiffs' Claims Should be Referred to a Three-Judge Court

37. **In the alternative, should this Court choose not to dismiss Plaintiffs' §5 claims, Defendants concur with Plaintiffs' request for an order immediately referring Plaintiffs' §5 claims to the Chief Judge of the United States Court of Appeals for the Fifth Circuit for the convening of a three-judge court.** According to §5, "any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28." 42 U.S.C. 1973c. *See Allen v. State Board of*

Elections, 393 U.S. 544, 563, 89 S.Ct. 817, 830 (1969) (stating that in light of the extraordinary nature of the [Voting Rights] Act, in general, and the unique approval requirements of §5, Congress intended that disputes involving the coverage of §5 be determined by a district court of three judges). Therefore, if this Court does not dismiss the claim as wholly insubstantial, it should enter an order immediately referring this case to the Chief Judge of the United States Court of Appeals for the Fifth Circuit for the convening of a three-judge court and a hearing on Plaintiffs' §5 claims immediately.

III.
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court issue an order dismissing Plaintiffs' claims because they fail to state a claim and are not ripe. In the alternative, Defendants pray that this Court dismiss Plaintiffs' §5 claims as wholly insubstantial under §5 of the Voting Rights Act of 1965. In the alternative, Defendants' pray that this Court enter an order immediately referring this case to the Chief Judge of the United States Court of Appeals for the Fifth Circuit for the convening of a three-judge court and an immediate oral hearing on the merits of Plaintiffs' §5 claims. Furthermore, Defendants request such other and further relief as the Court may deem just and proper, including, but not limited to, an award of its costs, expenses and attorneys' fees under 42 U.S.C. §1988.

Respectfully submitted,

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